

IN THE SUPREME COURT OF MISSOURI

MISSOURI DIVISION OF FINANCE,)	
)	
Appellant,)	
v.)	Case No. SC 92152
)	
ROY GAROZZO,)	
)	
Respondent.)	
)	

Appeal from the Circuit Court of St. Louis County, Missouri
related to Petition for Review of Agency Action
Case No. 10SL-CC04997
Hon. Joseph L. Walsh
Division 17

INITIAL BRIEF FILED ON BEHALF OF RESPONDENT

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INTRODUCTION AND SUMMARY

This case presents the issue of whether the State can constitutionally add a new punishment (denial of a mortgage originator's license) 30 months after an accused agrees to a suspended-imposition-of-sentence guilty plea on a Class C controlled-substance-possession charge, quickly followed by discharge from probation with no conviction occurring. Here, the Division of Finance felt that a recent Missouri statute required it to deny a license to Petitioner in the court below, despite his admitted exemplary record as a mortgage loan originator. The Circuit Court held that the statute was unconstitutionally applied to Petitioner (Judgment, Order, and Memorandum Opinion ("Judgment"), L.F. 83-107, attached in Appendix, at A1-A24).

Petitioner(below)/Respondent(here) Roy Garozzo was a mortgage loan originator who pled guilty in December 2006 to a Class C felony of possession of a controlled substance, with the plea conditioned upon a suspended imposition of sentence. Two months later, the St. Louis City Circuit Court discharged Mr. Garozzo from probation, finding that he had successfully completed all terms of his probation, so he was never convicted. More than two years later, Missouri passed a statute requiring mortgage loan originators to be licensed, but barred licenses to those who had pled guilty (even if not convicted) to *any* felony in the preceding seven years, whether or not related to fraud or financial misconduct.

Mr. Garozzo sought a mortgage loan originator's license from the Division of Finance when the statute became effective in 2010. The Division of Finance denied Mr. Garozzo's license application solely on the basis that the SIS plea barred Mr. Garozzo from receiving a license. Mr. Garozzo exhausted administrative remedies by appealing to the Residential Mortgage Board. The Board made numerous factual findings supportive of Mr. Garozzo, including that he has received praise by his employer, colleagues, and clients, with his employer having received no complaints about his service. The Board nevertheless felt that the licensing statute barred a license from being issued to Mr. Garozzo.

Mr. Garozzo brought a Petition for Review of Agency Action in the Circuit Court of St. Louis County. The Circuit Court properly held that this statute was unconstitutional as applied to Mr. Garozzo in that the legislature created a new punishment and imposed a new disability on Mr. Garozzo for conduct (1) that occurred prior to the enactment of the statute, (2) that was fully adjudicated and ended with no conviction prior to the enactment of the statute, and (3) that is not related to the subject matter of the license. In denying the public access to a highly-praised and competent individual, and in reaching back to add a punishment and disability after he has fulfilled all requirements of the criminal justice system, the statute is an unconstitutional bill of attainder, is an unconstitutional retrospective law, and violates due process.

Accordingly, the judgment of the Circuit Court should be affirmed.¹

¹ Because this matter involves review of an agency action, this opening brief is being filed by the prevailing party below, Respondent Roy Garozzo, who is seeking affirmance of the judgment of the trial court. *See* Order of this Court, dated 2/29/2012.

JURISDICTIONAL STATEMENT

This brief is being filed by Respondent Roy Garozzo pursuant to this Court's Order of February 29, 2012. It is the Appellant Division of Finance that is invoking the jurisdiction of this Court. Based on the jurisdictional statement previously filed by the Division with this Court, apparently the Division of Finance will assert that this matter involves the constitutionality of a statute of this State, and therefore will assert that this case is within the exclusive appellate jurisdiction of the Missouri Supreme Court per Mo. Const. art. V, § 3, and that the Appellant Division of Finance filed a timely notice of appeal pursuant to Mo. Sup. Ct. R. 81.04(a). The Notice of Appeal filed by the Division of Finance appears to have been filed within ten days of the trial court judgment becoming final.

STATEMENT OF FACTS

This case involves the challenge of Roy Garozzo to the denial of his application for a mortgage loan originator's license by Missouri Department of Insurance, Financial Institutions and Professional Registration, through the Division of Finance, the Commissioner of the Division of Finance in his official capacity, and/or the Missouri Residential Mortgage Board. The relevant facts are undisputed, and are largely contained in the findings of the Residential Mortgage Board, which denied Mr. Garozzo's appeal from the Division of Finance's refusal to issue him a license. Mr. Garozzo sought review in the Circuit Court of St. Louis County, where he was denominated the Petitioner. The Circuit Court ruled in favor of Mr. Garozzo, holding that the statute on which the denial was based was unconstitutional as applied to Mr. Garozzo, and ordered that he be granted a license. (Judgment, L.F. 83-107, A1-A24). Mr. Garozzo is the Respondent here. After Appellant Division of Finance filed a Motion to clarify the order of the briefing, this Court issued an order requiring Mr. Garozzo, the Respondent here, to file the first and last briefs in this case, and Appellant to file the second brief. *See* Order, 2/29/2012.

Mr. Garozzo has worked as a mortgage loan originator in the State of Missouri since November of 1985. (Mo. Mortgage Bd. Finding ¶2, L.F. 15, attached in Appendix at A25.) Mr. Garozzo has never been the subject of, or

received any complaints about, his services as a mortgage loan originator. (Mo. Mortgage Bd. Finding, L.F. 15 ¶ 3, A25; Mo. Mortgage Bd. Hrg., Ex. F, L.F. 64.) Mr. Garozzo has been praised by his employer for providing “exemplary service to all of his clients,” for never having received any complaints about his professional services, and for receiving much positive customer feedback for his work. (Mo. Mortgage Bd. Finding, L.F. 16 ¶ 12, A26; Mo. Mortgage Bd. Hrg., Ex. F, L.F. 64.) Mr. Garozzo has also been praised by colleagues with whom he works for having much integrity, and by numerous clients for helping them successfully navigate through the arduous process of acquiring a home. (Mo. Mortgage Bd. Finding, L.F. 16 ¶¶ 13-14, A26; Mo. Mortgage Bd. Hrg., Ex. F, L.F. 63-68.)

On December 11, 2006, Mr. Garozzo pled guilty in the Circuit Court of the City of St. Louis to a Class C felony involving possession of a controlled substance, which plea was subject to and expressly conditioned upon a suspended imposition of sentence pending the completion of certain special conditions. (Mo. Mortgage Bd. Finding, L.F. 15 ¶ 6, 25; Mo. Mortgage Bd. Hrg., Ex. 3, L.F. 49.) Two months later on February 21, 2007, the St. Louis City Circuit Court found that Mr. Garozzo had successfully completed all of the special conditions of probation and discharged him from the same. (Mo. Mortgage Bd. Finding, L.F. 15 ¶ 7, A25; Mo. Mortgage Bd. Hrg., Ex. 4, L.F. 50.) By successfully, fully, and promptly completing the special conditions of probation, no conviction ever resulted, and

therefore Mr. Garozzo was not convicted of a felony. (Mo. Mortgage Bd. Finding, L.F. 15 ¶ 8, 16 ¶ 11, A25-A26.) Mr. Garozzo's plea of guilty was "wholly unrelated to his professional services as a mortgage loan originator." (Mo. Mortgage Bd. Finding, L.F. 16 ¶ 11, A26.)

As of the time of the plea, there was no impact on Mr. Garozzo serving as a mortgage loan originator. (Judgment, L.F. 85, A3). That changed when the Missouri Legislature adopted a licensing requirement for mortgage loan originators in 2009, with an effective date of July 31, 2010, which was 2½ years after Mr. Garozzo's SIS plea. *See* Mo. Rev. Stat. §§ 443.701-443.893, effective date referenced at Mo. Rev. Stat. § 443.706.2 ("the Act"). Specifically, Section 443.706.1 of the Act states:

No individual...shall engage in the business of a mortgage loan originator concerning any dwelling located in Missouri without first obtaining and maintaining a license under sections 443.701 to 444.893 and obtaining employment and acting under the supervision of a single Missouri licensed residential mortgage broker.

Mo. Rev. Stat. § 443.706.1. The Act then goes on to restrict the issuance of such a license:

The director shall not issue a mortgage loan originator license unless the director makes, at a minimum, the following findings:

(2) The applicant has not been convicted of or pled guilty or *nolo contendere* to a felony in a domestic, foreign, or military court:

(a) During the seven-year period preceding the date of the application for licensing and registration.

Mo. Rev. Stat. § 443.713 (2)(a).

On July 27, 2010, Mr. Garozzo applied for a mortgage loan originator's license as required by the newly-enacted Act. (Mo. Mortgage Bd. Finding, L.F. 15 ¶ 4, A25.) On August 26, 2010, Mr. Garozzo received notice from the Division denying his application based on Section 443.713(2)(a) of the Act. (Ltr. from Division of Finance, August 26, 2010, L.F. 10-11; Mo. Mortgage Bd. Finding, L.F. 15 ¶ 5, A25.) Mr. Garozzo's application was denied solely and exclusively on the basis that Mr. Garozzo had been "convicted of, or pled guilty or *nolo contendere* to, any felony during the seven year period preceding" his application pursuant to Section 443.713(2)(a) of the Act. (Mo. Mortgage Bd. Finding, L.F. 15-16, ¶ 10, A25-A26.)

On August 30, 2010, Mr. Garozzo timely appealed the denial of his application to the Residential Mortgage Board (the "Board"). (E-mail Correspondence between Charlie Cook and Sam Marcum, L.F. 12-13.) The Board held a hearing on October 13, 2010 regarding Mr. Garozzo's appeal. (Notice of

Hrg., L.F. 14; Mo. Mortgage Bd. Finding, L.F. 15, ¶ 9, A25; Hrg. Tr., L.F. 18.) On November 15, 2010, the Board affirmed the Division's denial of Mr. Garozzo's license application. (Mo. Mortgage Bd. Decision, L.F. 15-17, A25-A27.) In denying the application, the Board made the following findings of fact:

- “Appellant has not been convicted of a felony within the seven year period preceding the Application, and his plea of guilty to a matter wholly unrelated to his professional services as a mortgage loan originator was subject to and expressly conditioned upon a suspended imposition of sentence subject to completion of certain special conditions, all of which were promptly and fully satisfied.”
- “Appellant has been praised by his employer for providing exemplary service to all of his clients, for never having received any complaints about his professional services, but rather receiving much positive customer feedback in response to their post closing evaluation.”
- “Appellant has been praised by colleagues with whom he works for having much integrity.”
- “Appellant has been praised by numerous clients for helping them successfully navigate through the arduous process of acquiring a home.”

(Mo. Mortgage Bd. Finding, L.F. 16 ¶¶ 11-14, A26.)

Notwithstanding these findings, the Board concluded that Section 443.713 “prohibits the Commissioner from issuing a mortgage loan originator license to an applicant who has pled guilty to a felony during the seven-year period preceding the date of the application for licensing and registration.” (Mo. Mortgage Bd. Conclusion of Law ¶ 4, L.F. 17, A27).

Mr. Garozzo filed a Petition for Review of Agency action in the Circuit Court of St. Louis County, Missouri on December 10, 2010. (Docket Sheet, L.F. 1.) The Petition was directed against (1) the Missouri Department of Insurance, Financial Institutions & Professional Registration, (2) its Division of Finance, (3) the Commissioner of the Division of Finance in his official capacity, and (4) the Missouri Residential Mortgage Board. (First Am. Pet., L.F. 70; Judgment, L.F. 88, A6)

Upon motion by Mr. Garozzo, the Court ordered the Division to issue Mr. Garozzo a temporary license pending the resolution of Mr. Garozzo’s appeal. (Docket Sheet, L.F. 1; Judgment, L.F. 88, A6.) On September 15, 2011, the Circuit Court reversed the Division’s decision denying Mr. Garozzo a license, entered a declaratory judgment that Section 443.713(2)(a) of the Act was unconstitutional *as applied* to Mr. Garozzo, and ordered the Division to issue Mr. Garozzo a permanent license. (Docket, L.F. 3; Judgment, L.F. 83-107, A1-A24.) More specifically, the Circuit Court found that Section 443.713(2)(a), as applied to Mr.

Garozzo, was an unconstitutional bill of attainder and retrospective law, and violated Mr. Garozzo's due process rights. (Judgment, L.F. 84, A2.) On October 21, 2011, the Division of Finance filed a notice of appeal seeking reversal of the Circuit Court's ruling. (Docket, L.F. 3; Notice of Appeal, L.F. 108-109.)

POINTS RELIED ON

- I. The Division of Finance erred in denying Mr. Garozzo a mortgage loan originator's license because Section 443.713 (2)(a), the statute on which the Division relied, is an unconstitutional Bill of Attainder as applied to Mr. Garozzo because it is a legislative punishment after the fact that bars Mr. Garozzo from participating in a legal business without advancing a proper purpose.**

Mo. Const. art. I, § 30

U.S. Const. art. I, § 10

Mo. Rev. Stat. § 443.713

State ex rel. Bunker Recycling & Reclamation, Inc. v. Mehan,
782 S.W. 2d 381 (Mo. 1990)

Missouri State Archives Finding Aid 5.20, Office of Secretary of State,
Commissions, Pardons, 1836-2007, Historical and Biographical Notes

- II. The Division of Finance erred in denying Mr. Garozzo a mortgage loan originator's license because Section 443.713 (2)(a), the statute on which the Division relied, is an unconstitutional retrospective law as applied to Mr. Garozzo because it impairs substantial rights and imposes new disabilities with respect to past transactions.**

Mo. Const. art. I, § 13

Mo. Rev. Stat. § 443.713

Mo. Rev. Stat. § 443.729

Mo. Real Estate Comm'n v. Rayford,

307 S.W.3d 686 (Mo. Ct. App. W.D. 2010)

- III. The Division of Finance erred in denying Mr. Garozzo a mortgage loan originator's license because Section 443.713 (2)(a), the statute on which the Division relied, violates the constitutional right to substantive due process by not being rationally related to a legitimate state interest and violates the right to procedural due process by changing the terms and consequences of his guilty plea after the fact.**

Mo. Const. art. I, § 10

U.S. Const. amend. XIV, § 1.

In re Marriage of Woodson,

92 S.W.3d 780 (Mo. banc 2003)

Missouri v. Frye,

132 S.Ct. 1399, 2012 WL 932020 (2012)

Mo. Real Estate Comm'n v. Rayford,

307 S.W.3d 686 (Mo. Ct. App. W.D. 2010)

Weber v. The Fireman's Retirement Sys.,

872 S.W.2d 477 (Mo. 1994)

ARGUMENT

The Standard of Review

The standard of review is the same for all three Points Relied On. Where a contested case is decided by an agency and then reviewed by a circuit court prior to being appealed to this Court, the Court reviews the findings and decision of the agency rather than the circuit court. *Morton v. Brenner*, 842 S.W. 2d 538, 540 (Mo. banc 1992). However, an administrative agency's decisions that are "based on the agency's interpretation of law are matters for the independent judgment of the reviewing court" and are therefore determined by the Court *de novo*. *Id.* at 540. Here, as the agency's findings of fact are not being disputed and as the Court is being asked to make a purely legal determination regarding the validity and constitutionality of a Missouri state statute, a *de novo* review is appropriate.

I. The Division of Finance erred in denying Mr. Garozzo a mortgage loan originator’s license because Section 443.713 (2)(a), the statute on which the Division relied, is an unconstitutional Bill of Attainder as applied to Mr. Garozzo because it is a legislative punishment after the fact that bars Mr. Garozzo from participating in a legal business without advancing a proper purpose.²

This Court should affirm the Circuit Court’s Judgment that reversed the Division’s decision denying Mr. Garozzo a mortgage loan originator’s license because the licensing statute, as applied to Mr. Garozzo, is an unconstitutional bill of attainder.

A. Elements of Unconstitutional Bills of Attainder.

Bills of attainder are prohibited under Article I, Section 30 of the Missouri Constitution, which provides “that no person can be attainted of treason or felony by the general assembly.” *See* Mo. Const. art. I, § 30. Likewise, Article I, Section 10 of the United States Constitution states that “[n]o state shall...pass any Bill of Attainder.” *See* U.S. Const. art. I, § 10.

² The Division of Finance is the only one of the Respondents in the trial court identified in the Point Relied On because no appeal was filed by the other trial court Respondents: (1) the Commissioner of the Division of Finance in his official capacity; and (2) the Missouri Residential Mortgage Board.

Bills of attainder are generally described as “legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial.” *State ex rel. Bunker Recycling & Reclamation, Inc. v. Mehan*, 782 S.W.2d 381, 385 (Mo. 1990)(citing *King v. Swenson*, 423 S.W.2d 699, 704 (Mo. 1968)). The *Bunker* case is similar to this one: the punishment at issue was the failure to issue a permit based on an after-the-fact statute: The *Bunker* case involved a challenge to Mo. Rev. Stat. § 260.204, which stated:

No person shall be issued a permit to operate a facility for the treatment of infectious waste who in 1987 received a clean air permit and thereafter operated a facility for the treatment of infectious waste by incineration without applying for and receiving a permit as a solid waste processing facility permitted pursuant to § 260.203 or a hazardous waste facility permitted pursuant to §§ 260.350 to 260.430.

Id. at 384.

There are two elements of a bill of attainder: (1) it must single out a “specifically designated person or group”; and (2) it must inflict punishment on that person or group. *Id.* at 386 (citing *Selective Service Sys. v. Minnesota Pub. Interest Research Group, et al.*, 468 U.S. 841 (1984)). A statute singles out a ‘specifically designated person or group’ if the person or group is “described in

terms of past conduct, which, because it is past conduct, operates only as a designation of particular persons” and imposes a punishment on an affected class whose membership “is determined entirely on past conduct and no method of escaping the class is provided.” *Id.* at 387.

The *Bunker* Court found that the singling-out element had been met where the statute in question barred a class of applicants from obtaining permits based entirely on past conduct and provided them no method for escaping the class. *Id.* at 386-387.

The “punishment” element is satisfied where (1) the challenged statute falls within the historical meaning of legislative punishment; and (2) the statute, viewed in a light of the severity of the burden it imposes, can reasonably be said to advance a nonpunitive legislative purpose. *Bunker*, 782 S.W.2d at 387-88.

The *Bunker* Court further found that the punishment element was satisfied because the statute barred a group “from participating in a lawful, albeit regulated, business or profession,” which the Court found was “historically recognized as a punishment.” *Bunker*, 782 S.W.2d at 387. The Court also found that no reasonable relationship between the statute’s prohibition and any proper legislative purpose for the prohibition existed. More specifically, the Court found that though the State claimed that the statute was intended to protect Missouri citizens and Missouri’s environment from individuals whom the State claimed had blatantly

violated the State's environmental laws, the statute in question did not achieve this purported purpose.

The Court stated that there was "no conceivable relationship between receiving a clean air permit in 1987 and the likelihood that the holder of such permit will violate the law in the future. If the legislative purpose was to deny permits to those of 'bad character' or those who were 'blatant violators,' the class described in the statute totally misses the mark." *Id.* at 388. The Court noted that while legislation intended to prevent future danger may be permissible, "if the function of the statute does not advance the intended purpose and the statute operates only as a punishment of specific persons or a class, the act is a bill of attainder." *Id.* at 387. Finally, the Court found that no legislative history evincing a congressional intent to punish existed. *Id.* at 388. However, as noted above, the Court found that such history was not required to establish that the statute was a bill of attainder. *Id.*

B. Mo. Rev. Stat. § 443.713(2)(a) is an Unconstitutional Bill of Attainder.

This Court's decision in *Bunker* compels the conclusion that Section 443.713(2)(a) and its implementing regulations violate the prohibition against bills of attainder contained in Article I, Section 30 of the Missouri Constitution as applied to Mr. Garozzo.

The first element is met because Section 443.713(2)(a) singles out Mr. Garozzo as part of a specifically designated group: individuals who have been convicted of or who pled guilty or *nolo contendere* to a felony during the seven years preceding their application for mortgage loan originators' licenses. This group is targeted solely based on past conduct. Further, there is no method of escaping from this group.

The Division did not really challenge the existence of this element in the trial court, except to point out that Mr. Garozzo could apply for a pardon. However, the possibility of obtaining a pardon cannot insulate an otherwise unconstitutional law that punishes after the fact. If that were the case, constitutional protections would be hollow. Mr. Garozzo cannot do anything to create a right to a pardon. And pardons are rarely granted. *See*, Missouri State Archives Finding Aid 5.20, Office of Secretary of State, Commissions, Pardons, 1836-2007, Historical and Biographical Notes, at 3, attached in Appendix at A43-A44. The hypothetical prospect of a pardon cannot be viewed as an escape hatch for Respondent that shields the Missouri Act from constitutional scrutiny.

The second element--punishment of the group--is also satisfied here. Under the *Bunker* test, Section 443.713(2)(a) falls within the historical meaning of legislative punishment because it bars a group "from participating in a lawful, albeit regulated, business or profession." *Bunker*, 782 S.W. 2d at 387 (citing

Cummings v. Missouri, 71 U.S. 277 (1867); *Ex Parte Garland*, 71 U.S. 333 (1866); *U.S. v. Lovett*, 328 U.S. 303 (1946)); *U.S. v. Brown*, 381 U.S. 437 (1965)). Contrary to the Division’s argument in the trial court, a bill of attainder is not limited to one historical use: punishing “disloyal subjects.”

Also, when viewed in light of the severity of the burden it imposes on Mr. Garozzo and his counterparts (barring Mr. Garozzo from engaging in a profession in which he has practiced for 25 years), it cannot reasonably be said to advance a nonpunitive legislative purpose. The Division argued in the trial court that Section 443.713(2)(a) has a reasonable “nonpunitive purpose” because it was allegedly intended to protect Missouri citizens from the fraud and dishonesty that occurred as part of the recent financial crisis, particularly with respect to home sales and financing. However, the Act does not contain a statement of purpose or a legislative finding indicating any connection between consumer protection and SIS pleas (no conviction) on Class C felonies not involving fraud or financial misdeeds.

Likewise, there is no rational relationship between protecting Missouri citizens from fraud and dishonesty and barring Mr. Garozzo from receiving a formal license. The Act has another section that addresses individuals who have engaged in acts of fraud, dishonesty, a breach of trust, or money laundering, and it permanently bars them from obtaining mortgage loan originator’s licenses. Mo.

Rev. Stat. § 443.713(2)(b).³ The legislature has drawn a line around fraud and financial misdeeds, and it is obvious why persons who engaged in those kinds of felonies would be subject to restrictive licensing. But the statute used against Mr. Garozzo (Section 443.713(2)(a)), targets individuals who have been convicted of or pled guilty to *any* type of felony, regardless of whether their actions indicate that they are likely to victimize the public in the manner targeted by the this legislation. Just as there was “no conceivable relationship” in *Bunker* between the permit restrictions and environmental protection, there is no conceivable relationship between Mr. Garozzo’s *alleged* Class C felony for possession of a controlled substance (which was never proven by the State or resulted in a conviction), and any need to protect consumers from an anticipated fraud upon consumers between now and the expiration of the seven year period prescribed by the statute (December 2013).

The trial court here stated that it “cannot discern a rational relationship between the State’s interest in protecting the consuming public and the SIS that

³ Pursuant to Mo. Rev. Stat. § 443.713(2)(b), a mortgage loan originator’s license may not be issued to an applicant who has “pled guilty or nolo contendere to a felony in a domestic, foreign, or military court:...(b) At any time preceding such date of application, if such felony involved an act of fraud, dishonesty, or a breach of trust, or money laundering...”

Garozzo received for simple drug possession.” (Judgment, L.F. 93, A11.) In fact, the undisputed evidence shows that Mr. Garozzo was praised by his colleagues and customers alike for his work, and never received a complaint of any sort related to the services he provided in his twenty-five year career as a mortgage loan originator. (Mo. Mortgage Bd. Finding, L.F. 15 ¶ 3; Mo. Mortgage Bd. Finding, L.F. 16 ¶¶ 12-14, A26; Mo. Mortgage Bd. Hrg., Ex. F, L.F. 63-68.) At the same time, denying Mr. Garozzo this license for the next year and a half will impose a terrible burden on Mr. Garozzo in that he will lose his ability to work as an originator, and therefore the hard won client and referral base he has worked so hard to establish.

In sum, Mo. Rev. Stat. § 443.713(2)(b) aims to bar a specific group of individuals “from participating in a lawful, albeit regulated, business or profession.” As a result, it violates the constitutional prohibition against bills of attainder.

II. The Division of Finance erred in denying Mr. Garozzo a mortgage loan originator's license because Section 443.713(2)(a), the statute on which the Division relied, is an unconstitutional retrospective law as applied to Mr. Garozzo because it impairs substantial rights and imposes new disabilities with respect to past transactions.

This Court should affirm the Circuit Court's Judgment that reversed the Division's decision denying Mr. Garozzo a mortgage loan originator's license because the licensing statute, as applied to Mr. Garozzo, is an unconstitutional retrospective law.

The Division of Finance denied Mr. Garozzo's application for a mortgage loan originator license solely based on his entry of a guilty plea to one count of possession of a controlled substance in exchange for a suspended imposition of sentence. (Mo. Mortgage Bd. Finding, L.F. 15-16, ¶ 10, A25-A26.) This effectively converted Mr. Garozzo's prior guilty plea into a *per se* basis for ineligibility to hold a formal mortgage loan originator's license, impairing rights and imposing disabilities after the conduct complained of occurred and after the criminal justice system completed all proceedings with Mr. Garozzo.

This result is prohibited by Article I, Section 13 of the Missouri Constitution, which provides that "no...law...retrospective in its operation...can be enacted." Mo. Const. art. I, § 13. A retrospective law is one that "takes away

or impairs vested or substantial rights acquired under existing laws or imposes new obligations, duties, or disabilities with respect to past transactions.” *See Mo. Real Estate Comm’n v. Rayford*, 307 S.W.3d 686, 690 (Mo. Ct. App. W.D. 2010) (citing *Hess v. Chase Manhattan Bank*, 220 S.W.3d 758, 769 (Mo. banc. 2007)). A plaintiff need only show that a statute *either* takes away or impairs vested or substantial rights *or* imposes new obligations, duties or disabilities – not both. *Rayford*, 307 S.W.3d at 690. “The constitutional inhibition against laws retrospective in operation...does not mean that no statute relating to past transactions can be constitutionally passed, but rather, that none can be allowed to operate retrospectively so as to affect such past transactions to the substantial prejudice of the parties interested.” *Rayford*, 301 S.W.3d at 690. The *Rayford* Court held that a statute that deprived a person of a real estate sales license based on a prior *nolo contendere* plea was an unconstitutional retrospective law.

Here, as in *Rayford*, the Division’s application of Section 443.713(2)(a) to deny a formal license to Mr. Garozzo is an unconstitutional retrospective law because it imposes new disabilities with respect to Mr. Garozzo’s past guilty plea. Mo. Rev. Stat. § 443.713(2)(a) makes him *per se* ineligible for a formal mortgage loan originator’s license for no reason other than that he pled guilty to one count of felony possession of a controlled substance four years ago. As in *Rayford*, Mr. Garozzo is being deprived of a license to engage in the occupation as a mortgage

loan originator as he had done for 25 years prior to the enactment of Section 443.713(2)(a).

Mr. Garozzo's situation presents an even stronger case for a finding of unconstitutionality than existed in *Rayford*. Kenneth Rayford spent 18 years in prison for second degree murder after pleading *nolo contendere*, a much more serious offense than Mr. Garozzo's. There was also a closer tie to public safety: there is a reason why the State would not want murderers to be in empty houses with prospective homebuyers. But there is no sensible reason to deny a mortgage loan originator a license based on a one-time SIS plea (not a conviction) related to possession of a controlled substance.

And even the stronger connection to safety in *Rayford* was not enough to save the statute there, which was enacted two years after Rayford's release from prison and barred licenses for individuals who were convicted of or pled guilty or *nolo contendere* to a "dangerous felony." The court held that the law was unconstitutionally retrospective because it "converts an antecedent criminal conviction into a *per se* basis for ineligibility to hold a real estate license . . . if applied to mandate the revocation of a real estate license in force on the statute's effective date" *Id.* at 695. The *Rayford* Court emphasized that Mr. Rayford had long since paid his debt to society. *Id.*

Mr. Garozzo paid his debt quickly: he was discharged from probation less than three months after his guilty plea, in February 2007. (Mo. Mortgage Bd. Finding ¶ 7, L.F. 15, A25). But he has been a mortgage loan originator since 1985. Like Mr. Rayford's situation, an antecedent criminal proceeding became a *per se* basis for Mr. Garozzo to lose the right to serve as a mortgage loan originator that he had previously enjoyed.

Section 443.713(2)(a) both impairs rights and imposes disabilities, although only one of those is required for a law to be retrospective. If Mr. Garozzo were to continue to operate as a mortgage loan originator as he had before 2010, the Director of the Division of Finance could "[i]mpose fines ...under subsections 2, 3, and 4 of this section." Mo. Rev. Stat. § 443.729.1(4). Then, subsection 3 allows the Director to "impose a civil penalty on a mortgage loan originator or person subject to" the Act if that person "has violated or failed to comply with any requirement . . . or any regulation" under the Act. Mo. Rev. Stat. §443.729.3. The fine can be as much as \$25,000. Mo. Rev. Stat. § 443.729.4. Thus, if Mr. Garozzo continues to engage in his profession without obtaining a license, he risks being fined or paying a civil penalty. The Act also includes the disability that would prevent Mr. Garozzo from obtaining a license, thus subjecting him to a penalty if he would merely maintain the status quo in his profession.

In sum, Mo. Rev. Stat. § 443.713 (2)(a) clearly “takes away or impairs vested or substantial rights acquired under existing laws or imposes new obligations, duties, or disabilities with respect to past transactions.” *Rayford*, 307 S.W.3d at 690. As a result, the Court should reverse Appellant’s decision and order it to issue Mr. Garozzo a mortgage loan originator’s license because its previous refusal to do so was based on a Missouri statute that, as applied to Mr. Garozzo, constitutes an unconstitutional retrospective law.

III. The Division of Finance erred in denying Mr. Garozzo a mortgage loan originator's license because Section 443.713 (2)(a), the statute on which the Division relied, violates the constitutional right to substantive due process by not being rationally related to a legitimate state interest and violates the right to procedural due process by changing the terms and consequences of his guilty plea after the fact.

This Court should affirm the Circuit Court's Judgment that reversed the Division's decision denying Mr. Garozzo a mortgage loan originator's license because the licensing statute, as applied to Mr. Garozzo, violated Mr. Garozzo's right to due process under the Missouri and United States Constitutions. The Missouri Constitution provides "[t]hat no person shall be deprived of life, liberty, or property without due process of law." Mo. Const. art. I, § 10. Similarly, the United States Constitution provides that no state "shall deprive any person of life, liberty or property without due process of law." U.S. Const. amend. XIV, § 1.

In order to comply with substantive due process principles, Mo. Rev. Stat. § 443.713(2)(a) must be "rationally related to a legitimate state interest." *In re Marriage of Woodson*, 92 S.W.3d 780, 784 (Mo. banc 2003). The rational basis test requires the statute to "have a legitimate governmental interest as its purpose and employ a rational or reasonable means of accomplishing its objective." *State ex rel. Classics Tavern Co., Inc. v. McMahon*, 783 S.W.2d 463, 465 (Mo. Ct. App.

E.D. 1990)(finding that refusal of Director of Revenue to renew liquor license pursuant to ordinance violated substantive due process rights of applicant). A state “cannot exclude a person...from any...occupation in a manner or for reasons that contravene” due process principles. *Schwartz v. Bd. of Bar Examiners of New Mexico*, 353 U.S. 232, 238-239 (1957). To the extent a state opts to impose certain restrictions on employment, such restrictions “must have a rational connection with the applicant’s fitness or capacity” to engage in an occupation. *Id.* at 239.

Here, no rational relationship exists between the State’s purported desire to prohibit bad actors from defrauding homebuyers and its prohibition in Mo. Rev. Stat. § 443.713(2)(a) against the issuance of mortgage loan originator licenses to applicants who have pleaded guilty or *nolo contendere* to felonies that are in no way indicative of an applicant’s tendency to defraud the public or their fitness to engage in their occupation. Again, Mr. Garozzo – who has been widely praised for his work as a mortgage loan originator - pleaded guilty to a Class C felony for drug possession – not to a felony involving deceit, dishonesty, fraud, or the like. (Mo. Mortgage Bd. Finding, L.F. 15 ¶¶ 3, 6, A25; Mo. Mortgage Bd. Finding, L.F. 16 ¶¶ 12-14, A26; Mo. Mortgage Bd. Hrg., Ex. 3, L.F. 49; Mo. Mortgage Bd. Hrg., Ex. F, L.F. 63-68.) Depriving Mr. Garozzo of a license on this basis is arbitrary, capricious, and irrational.

Further, the State has deprived Mr. Garozzo of a property interest in his right to continue acting as a mortgage loan originator without procedural due process. An existing license carries with it rights sufficient to require due process before the license can be impaired or revoked. *See Rayford*, 307 S.W.3d at 692. Mr. Garozzo did not hold a formal license because no such license was required prior to the effective date of the Act. However, for the last twenty-five years, he has had a *de facto* license to engage in his profession. In this respect, the State is taking away his livelihood in the same manner as the holder of a formal license through the denial of his application.

Mr. Garozzo's property right to continue acting as a mortgage loan originator was deprived by the State without procedural due process of law. Due process requires notice and opportunity for a hearing before a property right may be taken away. *Weber v. The Fireman's Retirement Sys.*, 872 S.W.2d 477, 479 (Mo. 1994). At the time Mr. Garozzo entered his guilty plea, the consequences of such plea were clear – a suspended imposition of sentence did not constitute a conviction, and accepting a suspended imposition of sentence would allow Mr. Garozzo to continue practicing as a mortgage loan originator as the clear legislative purpose of permitting defendants to receive a suspended imposition of sentence is so that defendants can avoid “the stigma of a lifetime conviction and

the punitive consequences that follow.” *See Yale v. City of Independence*, 846 S.W.2d 193 (Mo. banc. 1993).

Now, however, the consequences of Mr. Garozzo’s guilty plea have changed without notice to Mr. Garozzo. Had Mr. Garozzo known at the time that entry of a guilty plea would not afford him the benefits generally associated with a suspended imposition of sentence, he might have contested the count against him and sought a resolution that would have allowed his continued employment as a mortgage loan originator.

The importance of the accused being fully informed regarding plea agreements was recently reiterated by the United States Supreme Court. In *Missouri v. Frye*, 132 S.Ct. 1399, 2012 WL 932020 (2012), the United States Supreme Court recognized the constitutional right of the accused to have formal plea offers conveyed to the accused so that the decision to accept or reject a plea can be made based on necessary information. *Id.* at 1406-1408. The Court noted that plea bargains are so prevalent (94% of all state convictions) that “the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.” *Id.* at 1407.

The *Frye* case addressed the question of ineffective assistance of counsel when plea information is not conveyed to the accused. But what happened to Mr. Garozzo is much worse. Even the best criminal defense attorney in Missouri could

not have advised Mr. Garozzo in 2006 that the law would change in three years to impose a severe penalty—depriving Mr. Garozzo of his livelihood for more than 25 years. Nor could even a great criminal defense attorney have predicted that such a sanction would befall an individual with an impeccable record of service in his profession based on an isolated Class C felony that did not result in a conviction and that did not involve fraud or financial wrongdoing. It is hard to imagine more unfair treatment of Mr. Garozzo by the State.

In sum, Mr. Garozzo is poised to lose the career he has successfully and lawfully maintained for more than two decades based on the State's irrational notion that his drug possession plea indicates that he is likely to defraud or otherwise harm the public. This plea was offered without the knowledge that four years later it could deprive him of his livelihood. This result violates both the Missouri and United States Constitutions, and should not be permitted by the Court. Therefore, the Court should reverse Appellant's denial of Mr. Garozzo's application and order Appellant to issue him a mortgage loan originator's license.

CONCLUSION

The statute on which the Respondents below relied in denying a license to Mr. Garozzo unfairly and unconstitutionally adds a disability and punishment to Mr. Garozzo long after he fulfilled all requirements imposed by the criminal justice system. In Mr. Garozzo's case, where there was no conviction and the charge did not involve fraud or financial improprieties, the statute as applied to Mr. Garozzo violates the state and federal constitutions. The trial court correctly analyzed these issues. Its judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Missouri Supreme Court Rule 84.06(b) and (c), the undersigned certifies that the foregoing Initial Brief Filed on Behalf of Respondent complies with the type-volume limitations, using fourteen point double-spaced typeface in Times New Roman font, and based on the number of words of text in the brief as determined by the word count of Microsoft Word, which is the word-processing system used to prepare the Brief. Based on the word count, the number of words in this Brief is 7,107, excluding the cover page, certificate of service, certificate of compliance, signature block and appendix, which is less than the 31,000 word limit permitted by Rule 84.06(b) for an initial brief required to be filed by Respondent pursuant to Rule 84.05(e) and the Court's Order dated February 29, 2012.

/s/ Erwin O. Switzer

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the Initial Brief Filed on Behalf of Respondent, and Respondent's Appendix to Initial Brief Filed on Behalf of Respondent were served via the Court's electronic filing system on counsel for Appellant, this 30th day of April, 2012.

/s/ Erwin O. Switzer